BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRENDA J. PRIEST Claimant	)	
VS.	)	
FOOT LOCKER RETAIL, INC. Respondent	)	Docket No. **1,062,248**
AND	)	
AMERICAN CASUALTY COMPANY OF READING, PA Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the December 14, 2012, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript and exhibit, dated December 12, 2012, and all pleadings contained in the administrative file.

The ALJ found claimant sustained personal injury by accident arising out of and in the course of her employment with respondent.

ISSUES

Respondent requests review of whether the ALJ erred in her "finding of compensability."[1] Specifically, respondent contends the alleged accidental injury was not the prevailing factor in causing claimant's injury, medical condition and resulting disability or impairment. Respondent also maintains claimant's injury is not compensable because claimant's work was only a triggering or precipitating factor, and because claimant's injury

[1] Application for Review at 1.

solely aggravated, accelerated, or exacerbated a preexisting condition or rendered a preexisting condition symptomatic.

Claimant argues the ALJ's Preliminary Hearing Order should be affirmed.

The issue raised on review is:

1. Whether the ALJ erred in finding claimant sustained personal injury by accident arising out of and in the course of her employment, including:

a. Whether claimant proved her alleged accident was the prevailing factor causing her injury, medical condition, and resulting disability or impairment; and

b. Whether the ALJ erred in finding the claim compensable under the 2011 amendments to the Act dealing with triggering or precipitating factors; injuries that solely aggravate, accelerate, or exacerbate a preexisting condition; and injuries which render a preexisting condition symptomatic.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

When the preliminary hearing occurred on December 12, 2012, claimant was age 53. She worked for respondent as a material handler II, a job which primarily required the loading and unloading of trucks. Claimant's duties included routinely lifting boxes weighing 60-65 pounds. Claimant had worked for respondent approximately 6 years when she suffered her alleged accidental injury on September 2, 2011.

Claimant testified that she had no problems, symptoms, injuries, lost time from work, or medical treatment for her neck before the September 2, 2011 event.

Claimant described her September 2, 2011, accident:

> We were unloading trucks out on the receiving dock. And I was unloading them and palletizing them. They were big heavy boxes.
>
> . . .
>
> As I was doing it I noticed I lifted one of the real, real heavy ones, a 60 pound one, my neck started hurting. I just thought well -- I just went ahead and finished out the day.[2]

[2] P.H. Trans. at 8.

As claimant continued to work on September 2, 2011, her neck pain gradually worsened. Claimant was off work the next day, September 3, 2011. She reported her injury to respondent on September 6, 2011. Respondent referred claimant to a physician's assistant, Michael Beffa, PA-C. Claimant reported to Mr. Beffa she had pain in both the right and left sides of her neck which radiated down the left side into her left shoulder and left arm. Claimant received light-duty work restrictions, which respondent accommodated until September 5, 2012, when respondent sent claimant home. Claimant was terminated by respondent due to absenteeism.

Claimant underwent a cervical MRI scan on October 6, 2011, which revealed: degenerative disk disease with disk bulges at multiple levels, which had a mild effect on, or "flattening"[3] of, the anterior spinal cord; neural foraminal narrowing at C4-5, C5-6 and C6-7; and hypertrophic bony ridging at the same three levels, which contributed to claimant's central canal and foraminal stenosis.

Claimant was referred to Dr. Matthew Henry, who first examined and evaluated claimant on October 18, 2011. The doctor recommended operative intervention but claimant declined to undergo surgery. Claimant continued to receive conservative treatment, consisting of physical therapy, anti-inflammatory medication, and muscle relaxants.

Claimant was examined and evaluated by Dr. Steven Peloquin on December 7, 2011. The doctor's diagnostic impression included degenerative changes in the cervical spine with neck and arm pain beginning on September 2, 2011, when claimant was unloading boxes. Dr. Peloquin recommended steroid injections. Claimant received cervical epidural steroid injections on December 14, 2011, January 4, 2012, and February 1, 2012.

Claimant returned for follow-up appointments with Dr. Henry on January 17, 2012, and on February 21, 2012. Dr. Henry recommended a C4-5, C5-6 and C6-7 anterior cervical diskectomy with fusion and anterior instrumentation.

Respondent referred claimant to Dr. Stephen Reintjes, a neurosurgeon. Dr. Reintjes examined and evaluated claimant on June 27, 2012, and diagnosed bilateral foraminal stenosis at C5-6 and C6-7. Dr. Reintjes recommended a C5-6 and C6-7 foraminotomy.

Dr. Reintjes opined that claimant's work event of September 2, 2011, was the prevailing factor in causing her disability. Dr. Reintjes explained as follows:

---

[3] P.H. Trans., Cl. Ex. 1 at 100.

> I do believe that the foraminal stenosis preexisted the work injury of 09/02/2011, but the work injury of 09/02/2011 caused the foraminal stenosis to result in the C7 radiculopathy. Therefore, the work event is the prevailing factor in causing the disability.[4]

A CT scan and a myelogram of the cervical spine were performed on June 25, 2012. The CT scan revealed:

> There is narrowing of the disc spaces at C4-C5, C5-C6 and C6-C7. Calcific spurring changes seen posteriorly throughout the entire length of C6. There is diffuse apophyseal spurring change identified on the coronal reconstructed views at C4-C5, C5-C6 and C6-C7. The cervical cord is normal in size and contour. No intramedullary or intradural deformity is seen. There is mild circumferential stenosis at C5-C6. There is mild narrowing of both lateral recesses secondary to apophyseal spurring. There is effacement of the anterior subarachnoid space at this level secondary to calcific spurring. There is foraminal narrowing bilaterally at C6-C7 secondary to apophyseal spurring. No abnormality seen at C7-T1.
>
> IMPRESSION:
>
> Degenerative disc disease as described above. A foraminal narrowing bilaterally associated [with] a mild stenosis at the C5-C6 and C6-C7.[5]

The myelogram revealed:

> There is an obstruction to the free flow of contrast at the C6-7 level. There is poor root sleeve filling bilaterally at the C6-7 level. Contrast eventually traverses this area. There is extremely poor root sleeve filling bilaterally at C4-5, C5-6 and C6-7. The subarachnoid space appears to be considerably thinned at these levels. The lateral view shows mild effacement of the anterior subarachnoid space at C4-5, C5-6 and C6-7. There is disc space narrowing at all these levels.
>
> IMPRESSION:
>
> Mild diffuse stenosis is suggested from C4-5, C5-6 and C6-7 most likely secondary to spurring. Partial obstruction to the free flow of contrast initially at C6-7.[6]

Dr. Zhengyu Hu examined and evaluated claimant on June 26, 2012. Dr. Hu diagnosed left cervical radicular symptoms suggestive of possible cervical radiculopathy. Dr. Hu recommended an EMG study.

---

[4] P.H. Trans., Cl. Ex. 1 at 18.

[5] *Id.*, Cl. Ex. 1 at 24.

[6] *Id.*, Cl. Ex. 1 at 25.

On June 26, 2012, an EMG/NCS was performed. It revealed chronic left C5, C6, and C7 radiculopathy, and mild median nerve entrapment at the left wrist.

Evidently, respondent was not pleased with the opinions of Dr. Reintjes, so another examination was scheduled, this time with Dr. Paul Stein, a neurosurgeon. On July 5, 2012, Dr. Stein examined and evaluated claimant, who had symptoms of left-sided neck pain, left upper extremity pain and numbness extending into the fingers of the left hand. Dr. Stein diagnosed nerve root irritation in the cervical spine on the left due to an aggravation of preexisting degenerative disk disease. Dr. Stein recommended surgical treatment. In his report dated July 29, 2012, Dr. Stein opined:

> [I]n this case it would be my opinion that the prevailing factor is the degenerative change, and that the work activity was likely an important but secondary factor. Given the chronic nature of the EMG changes and the extent of the degenerative changes, symptomatology was likely to occur at some time absent the work activity. The work activity was a triggering and accelerating factor.

On November 5, 2012, claimant was examined at her counsel's request by Dr. Edward Prostic, an orthopedic surgeon. Dr. Prostic diagnosed carpal tunnel syndrome and mild rotator cuff tendinitis. Claimant's major problem, however, was the cervical spine, which Dr. Prostic recommended be treated surgically as proposed by Dr. Reintjes.

Dr. Prostic opined: "The work-related accident sustained September 2, 2011 while working for Footlocker is the prevailing factor in causing the injury, the medical condition and the need for medical treatment."[7]

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b (a), (b) and (c) provide:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
>
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

[7] P.H. Trans., Ex. 1 at 3.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) provides:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(h) provides:

Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

. . .

K.S.A. 2011 Supp. 44-508(f) provides in relevant part:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

K.S.A. 2011 Supp. 44-508(g) provides:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

The undersigned Board member finds that the ALJ's Preliminary Hearing Order must be reversed.

Kansas law in effect before May 15, 2011, (Old Act), allowed compensation for any aggravation, acceleration or intensification of a preexisting condition.[8] However, the 2011 amendments (New Act) change the Old Act in a number of significant ways, including:

1. The definition of "accident" now requires the accident must be the prevailing factor in causing the injury.

2. Claimant's burden to prove "arises out of and in the course of employment" now requires the following:

a. An injury is not compensable because work was a triggering or precipitating factor; and

b. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

[8] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 589, 257 P.3d 255 (2011).

Ordinarily, courts presume that, by changing the language of a statute, the legislature intends either to clarify its meaning or to change its effect.[9] In *Bergstrom*, the Kansas Supreme Court held:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[10]

It seems clear the Kansas legislature, in enacting the May 15, 2011 amendments, intended to limit recovery in claims that involve aggravations of preexisting conditions or which render preexisting conditions symptomatic.

The Appeals Board has found accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite claimant also having an aggravation of a preexisting condition. Several prior decisions tend to show compensability where there is a demonstrated physical injury above and beyond a sole aggravation of a preexisting condition:

- A claimant's accident did not solely cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.[11]

- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.[12]

- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.[13]

---

[9] *Watkins v. Hartsock*, 245 Kan. 756, 759, 783 P.2d 1293 (1989).

[10] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[11] *Homan v. U.S.D. #259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

[12] *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

[13] *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB Jul. 13, 2012).

- An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court-ordered doctor opined the accident caused a new tear in claimant's medial meniscus.[14]

- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.[15]

- A motor vehicle accident did not solely aggravate, accelerate or exacerbate claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.[16]

In all of these cases, claimant proved his or her accident was the prevailing factor in causing the injury, medical condition and resulting disability.

Although Dr. Prostic and Dr. Reintjes indicated claimant's lifting incident was the prevailing factor causing the injury or disability, a careful review of all the medical records and reports prove claimant had significant preexisting degenerative disease in her cervical spine which was made symptomatic by claimant's accident. However, Dr. Prostic is completely silent regarding the role claimant's preexisting degenerative disease played in causing claimant's central canal and foraminal stenosis. Dr. Prostic provided no rationale for his "prevailing cause" opinion. Nor did Dr. Prostic specify any lesion or change in the physical structure of the body claimant's lifting at work caused, beyond aggravating the preexisting disease and making it symptomatic. Claimant's numerous diagnostic tests (MRI, EMG, CT scan, and myelogram) indicated the presence of degenerative cervical disc bulging, at multiple levels of the cervical spine, which compressed the anterior spinal cord. The testing also showed claimant's neural foraminal stenosis was the consequence of degenerative bony spurring and ridging.

Dr. Reintjes' opinion uses the phrase "prevailing factor" but he appears to conclude that claimant's foraminal stenosis preexisted the September 2, 2011, accident, and that the lifting caused the preexisting stenosis to result in C7 radiculopathy. The undersigned Board member construes Dr. Reintjes' explanation to essentially say claimant's preexisting condition was triggered, aggravated, accelerated, or made symptomatic by the lifting event.

Dr. Stein's opinions are persuasive under the circumstances of this claim. In his opinion, claimant's lifting incident was an important, but secondary, factor in causing claimant's injury. In concluding that the preexisting condition was the prevailing factor in

---

[14] *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

[15] *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

[16] *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 20, 2012).

causing the injury, Dr. Stein underscored the results of the EMG, which demonstrated chronic, not acute, radiculopathy, Claimant's activity at work was a triggering or accelerating factor.

No medical records or reports document any separate lesion or change in the body's physical structure. The testing shows no disk herniation, fracture or dislocation. To be sure, claimant had no symptoms in her neck or left upper extremity before lifting the box on September 2, 2011. The evidence also supports the finding that following the lifting incident claimant developed neck pain and pain and numbness in her left arm and left hand. Claimant's symptoms were serious enough that the medical opinions are unanimous that she requires decompressive surgery and fusion at multiple levels of the cervical spine.

However, no physician opined claimant's widespread disk disease and bony degeneration were the result of claimant's accident. The evidence establishes claimant's degenerative disease and stenosis preexisted the accident. The lifting event was a triggering or precipitating factor. The lifting solely made the preexisting condition symptomatic, or solely aggravated or accelerated claimant's degenerative disease. The lifting made the preexisting condition symptomatic. As such, the claim is not compensable pursuant to K.S.A. 2011 Supp. 44-508(f)(2).

Claimant's accident was not the prevailing factor causing the injury, nor was the accident the prevailing factor causing claimant's medical condition or current level of disability or impairment. Accordingly, the claim is not compensable pursuant to K.S.A. 2011 Supp. 44-508(d) and 508(f)(2)(B)(ii).

CONCLUSION

This Board member finds:

1. Claimant did not satisfy her burden to prove she sustained personal injury by accident arising out of and in the course of her employment with respondent:

a. Claimant's alleged accident was not the prevailing factor causing her injury, medical condition, and resulting disability or impairment; and

b. Claimant's claim is not compensable under the provisions of the New Act dealing with triggering or precipitating factors; injuries that solely aggravate, accelerate, or exacerbate a preexisting condition; and injuries which render a preexisting condition symptomatic.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[17] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[18]

WHEREFORE, the undersigned Board Member finds that the December 14, 2012, preliminary hearing Order entered by ALJ Rebecca A. Sanders is reversed.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

e: Jeff K. Cooper, Attorney for Claimant
jeff@jkcooperlaw.com
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
ekuhn@foulston.com
Rebecca A. Sanders, ALJ

[17] K.S.A. 44-534a.

[18] K.S.A. 2011 Supp. 44-555c(k).